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Developing constitutional principles through firefighting: social security parity in Northern Ireland

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Abstract

The convention of parity of social security provision between Northern Ireland and Great Britain is explored as an example of how the uncodified UK constitution allows hasty, nominally temporary responses to chance events to gain decisive force in a particular field of governance or policy. As Northern Ireland's politicians debate the future of parity to an unprecedented extent and Scotland looks to the development of a new post-referendum settlement of which, the Westminster parties have promised, greater devolved responsibility for "welfare" will play a part, discussion of the lessons of parity for those who would favour meaningful regional control of social security is timely. The author suggests that the key challenge is finding a settlement that affords economically weaker regions genuine policy autonomy without diminution of living standards.

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*"We Englishmen are very proud of our constitution, Sir. It was bestowed upon us by Providence. No country is as favoured as this country."*¹

C Dickens

Introduction

The oft-cited extract from Dickens above reflects one of two perspectives identified by van Caenegem on how constitutions come to be and develop: the providential interpretation and the chance interpretation.² Dickens's intention is somewhat ironic: as this paper will demonstrate, it would be difficult to present (at least some aspects of) the UK constitution as the outworking of "divine providence." Instead, an example will be considered of how its development has more closely resembled "an incoherent and chaotic spectacle... where human folly and chance play a leading role."³

In the absence of a single constitutional document, constitutional law and practice in the UK is based on multiple sources. While much is in the form of statutes – a large volume of which were generated in a flurry of reform during the New Labour era⁴ – some of the most fundamental constitutional principles, arguably including that of Parliamentary supremacy,⁵ find their basis in convention. One such principle is social security parity in Northern Ireland. Although the region's constitutional legislation

¹ C Dickens, *Our mutual friend* (Penguin, 1976) 178

² RC van Caenegem, 'Constitutional history: chance or grand design?' (2009) 5(3) *European Constitutional Law Review* 447, 447

³ RC van Caenegem, 'Constitutional history: chance or grand design?' (2009) 5(3) *European Constitutional Law Review* 447, 447

⁴ For an overview, see V Bogdanor, *The new British constitution* (Hart, 2009) 4

⁵ *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56 para 120 (Lord Hope of Craighead); Parliamentary sovereignty may alternatively be viewed as a common law doctrine, as appears to be the interpretation adopted in *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 47, 273 (Lord Millett)

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makes a somewhat vague reference to the operation of “single systems of social security, child support and pensions for the United Kingdom,”⁶ this in no way conveys the extent to which devolved institutions have felt constrained in the use of their competence for social security. Despite formal devolved competence in this field, policy in Northern Ireland has in practice almost invariably replicated that in Great Britain. The reasons for the emergence of this approach, its merits or otherwise for Northern Ireland and the growing prospects of change will be considered below.

Social security parity is not merely a useful case study of the sometimes haphazard development of the UK constitution, but particularly merits consideration in the current context of uncertainty as to the future development of the devolution settlement. From a Northern Ireland perspective, a constitutional convention that appears unassailable at one point in history may at another be dropped as quickly as it initially became entrenched, should the political climate change sufficiently. This process may now have begun in respect of parity; a study of the history of the convention points to some reasons why it should be questioned at this particular moment. From the Scottish or Welsh point of view, the experience of devolved competence in Northern Ireland will be instructive as those regions consider their own constitutional futures. With Scotland likely to gain some measure of competence for social security in the wake of the September 2014 referendum on independence, policymakers there will be anxious to learn such lessons as are possible from Northern Ireland’s experience. Wales has thus far shown little appetite for control of social security, but the devolution of competence to Scotland combined with departure from parity in Northern Ireland would be likely to generate

⁶ Northern Ireland Act 1998 c47 s87(1)

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some debate in a region whose economic circumstances are more analogous to Northern Ireland than are Scotland's.

The paper begins with a brief overview of van Caenegem's two views of the development of constitutional law and how these have played out in the UK. Section 2 then outlines the place of social security in the devolution settlement, before section 3 looks in greater detail at the emergence of the parity convention in Northern Ireland. Section 4 examines the evolution of political attitudes to parity, from wholehearted endorsement in the 1920s and 1930s to the more sceptical view of the 1980s and (in some quarters) open hostility in light of recent UK government policy. This raises the prospect of future departure from parity, the focus of section 5. Finally, section 6 considers the possible lessons of the Northern Ireland experience for Scotland and Wales.

1. Development of the constitution

Van Caenegem identifies two principal approaches to the study of history. The first, the "providential interpretation," views historic events as the result of "some intelligent design resulting in unstoppable progress." Alternatively, the "chance interpretation" sees a greater role for "human folly," "chance" and "fortuitous circumstances beyond human control."⁷ These perspectives are as prevalent in the study of constitutional history as in any other field. A stable, codified constitution might conceivably be described as the result of some "grand design" in the sense that it emerges from a process of careful consideration and negotiation, although even in such circumstances the search for compromise between different factions

⁷ RC van Caenegem, 'Constitutional history: chance or grand design?' (2009) 5(3) European Constitutional Law Review 447, 447

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means the ultimate outcome may not be what any group initially envisaged.⁸ In the UK, where unusually “there is no written constitution in the formal sense,”⁹ the process can be messier still, amendment occurring through the enactment of an ordinary Act of Parliament, the natural evolution of the common law or the emergence of a new political practice that, through accident or design, becomes an accepted convention.

That is not to say that constitutional change in the UK *cannot* flow from “grand design.” The New Labour government elected in 1997 took office with, and in large measure delivered, an ambitious programme of constitutional reform.¹⁰ However, even a government with a large House of Commons majority and a clear commitment to reform may be constrained or frustrated by what is politically possible or the parliamentary timetable. Hence Labour’s manifesto commitment to a “more democratic and representative” House of Lords stalled after only partial completion of its first stage, the promised removal of all hereditary peers.¹¹ Forethought is likely to play even less of a role in the evolution of other forms of constitutional law or practice. The common law evolves through judicial decision, but the court’s first duty is to consider the case before it on its own facts: the

⁸ For a brief overview of the search for compromise in the drafting of the Deutsche Grundgesetz between occupying forces eager to expedite the foundation of a West German state and representatives of the Bundesländer concerned that this would act as an obstacle to reunification, and between political groupings with differing visions for the division of competence between regional and federal governments, see M Görtemaker, ‘Von den Londoner Empfehlungen zum Grundgesetz’ (Bundeszentrale für politische Bildung, 2007) <<http://www.bpb.de/geschichte/deutsche-geschichte/grundgesetz-und-parlamentarischer-rat/38975/kurzueberblick> > accessed 5 September 2014; W Benz, ‘Weichenstellungen für den Weststaat’ (Bundeszentrale für politische Bildung, 2008) <<http://www.bpb.de/geschichte/deutsche-geschichte/grundgesetz-und-parlamentarischer-rat/39010/erste-schritte> > accessed 5 September 2014

⁹ JF McDowney, *Public law* (Sweet & Maxwell, 1994) 5

¹⁰ See V Bogdanor, *The new British constitution* (Hart, 2009)

¹¹ See P Dorey, ‘Stumbling through “stage 2”: New Labour and House of Lords reform’ (2008) 3 British Politics 22

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constitutional implications of the judgment are of secondary, if any, importance to the decision-maker.¹² This paper is most concerned with conventions. These will be demonstrated as emerging, in some circumstances at least, as a hasty response (allowing “human folly” the opportunity to play a role) to unforeseen events (“circumstances beyond human control”). In the case study, social security parity in Northern Ireland, a convention developed as an emergency response to an acute fiscal crisis flew in the face of successive Liberal governments’ carefully considered plan to keep events in and the politics of Ireland at arm’s length from Westminster,¹³ but has for decades been the most important principle underlying devolved lawmaking in this field.¹⁴

2. Social security in the devolution settlement

The convention of social security parity is peculiar to Northern Ireland because of the unique place of social security in the region’s devolution settlement. In Wales, social security is not among the matters devolved to the National Assembly, while in Scotland, where *all* fields are devolved unless explicitly exempted by the constitutional legislation, it is among the powers reserved to Westminster. In Northern Ireland, where division of power is based on a similar model to Scotland,

¹² R Buxton, ‘How the common law gets made: [Hedley Byrne](#) and other cautionary tales’ (2009) 125(Jan) Law Quarterly Review 60

¹³ The wider failure of the Government of Ireland Acts 1914 c91 and 1920 c67 to remove the ‘Irish Question’ from UK politics is documented by K Matthews, ‘Stanley Baldwin’s “Irish Question”’ (2000) 43(4) The Historical Journal 1027; CK Matthews, ‘The Irish boundary crisis and the re-shaping of British politics: 1920-1925’ (PhD thesis, London school of Economics, 2000)

¹⁴ S Livingstone and J Morison, ‘An audit of democracy in Northern Ireland’ (1995) 337 Fortnight 3, 16

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social security is neither a reserved matter nor an excepted matter, and therefore falls within the competence of the Assembly.¹⁵

Why social security should be treated differently in Northern Ireland is not wholly clear, but is almost certainly due at least in part to the different timing of the advent of devolution. The region has been described as the world's first "perfect example of devolution,"¹⁶ with the powers of today's Assembly essentially mirroring those envisaged for an Irish 'home rule' parliament in 1914 and actually devolved to the former Parliament of Northern Ireland in 1920. At this time, the welfare state was in its infancy: the state pension (limited and not yet universal) and national insurance had been in place for only six and three years respectively in 1914, while unemployment insurance did not cover most manual workers until 1921.¹⁷ Clearly, it was not considered that control of the nascent social insurance system would represent too onerous a responsibility for Northern Ireland, although it was subsequently argued that this view was mistaken.¹⁸ The Liberal vision of "devolution all round" would not come to fruition until 1998,¹⁹ at which time the experience of Northern Ireland undoubtedly influenced the decision to retain UK government control of social security.

¹⁵ Scotland Act 1998 c46 s29, sch 5 head F; Northern Ireland Act 1998 c47 s4, s6(2), sch 2, sch 3; Government of Wales Act 2006 c32 s108, sch 5

¹⁶ "An American professor," cited by JI Cook, 'Financial relations between the Exchequers of the United Kingdom and Northern Ireland' in FH Newark, JI Cook, DAE Harkness, LGP Preer and DG Neill, *Devolution of government: the experiment in Northern Ireland* (George Allen and Unwin, 1953) 18

¹⁷ K Woodroffe, 'The making of the welfare state in England: a summary of its origins and development' (1968) 1(4) *Journal of Social History* 303

¹⁸ Earl of Plymouth, HL Deb 23 March 1926 vol 63 col 747; D Reid, HC Deb 9 March 1926, vol 192 col 2174; J Craig, HC Deb 1 March 1929 vol 225 col 2360; Lord Templemore, HL Deb 17 March 1936 vol 100 col 4

¹⁹ DG Neill, 'Some consequences of government by devolution in Northern Ireland' in FH Newark, JI Cook, DAE Harkness, LGP Preer and DG Neill, *Devolution of government: the experiment in Northern Ireland* (George Allen and Unwin, 1953) 86; see also V Bogdanor, *The new British constitution* (Hart, 2009) 90

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That regional control of social security might be somewhat qualified is hinted at in Northern Ireland's constitutional legislation. This states that the Minister responsible for social security and the Secretary of State:

*"shall from time to time consult one another with a view to securing that, to the extent agreed between them, the legislation... provides single systems of social security, child support and pensions for the United Kingdom."*²⁰

Subsequent provisions refer to the coordination of legislation and to the making of "any necessary financial adjustments" that result. If the reference to "the extent agreed between" the Ministers appears to imply a rather flexible arrangement, its practical manifestation has usually been anything but.

Given the difficulties caused by devolved control of social insurance in the 1920s, the decision not to devolve competence to Scotland and Wales in the 1990s and the UK government's statement in 2009, when considering the future of devolution in Scotland, that it remained "deeply committed" to the maintenance of a single social security system as part of the social union,²¹ it may legitimately be asked why arrangements for Northern Ireland were never revised. A turbulent history has provided ample opportunity for constitutional reform, with political instability leading to the suspension of devolution in 1972 followed by several abortive attempts at restoration in revised form before the apparent return of a measure of

²⁰ Northern Ireland Act 1998 c47 s87(1); similar provisions appear in previous legislation, for example Social Security Administration (Northern Ireland) Act 1992 c8 s153

²¹ Scotland Office, 'Scotland's future in the United Kingdom: building on ten years of Scottish devolution' (Cm 7738, Scotland Office, 2009) 4

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stability from 2007.²² Possibly, it was assumed that the parity principle was sufficiently well established to maintain the social union without the need to renegotiate the division of competences. Parity has indeed served this purpose for decades, but recent events have shown that even long-established conventions are not invulnerable if political opinion turns sufficiently against them.

3. From fiscal crisis to the parity principle

Despite the extensive powers transferred to the Northern Ireland Parliament in 1920, in the early period of devolution the favoured approach to a range of fields of social policy was to adopt on a “step-by-step” basis any new measure introduced for Great Britain.²³ The region’s first Prime Minister stated that:

“Since the Northern Ireland Government was set up, it has always been its desire to treat [everybody] in the matter of legislation and benefit, precisely on the same level as similar people are treated in [Great Britain].”²⁴

A key motivation was the desire of Unionist governments initially hostile to ‘home rule’ to facilitate future reintegration into a unitary state,²⁵ although, as shall be seen,

²² The search for a permanent constitutional settlement is illustrated by Northern Ireland Constitution Act 1973 c36; NI Constitutional Convention, *Northern Ireland Constitutional Convention report* (HMSO, 1975); Northern Ireland Act 1982 c38; Northern Ireland Act 1998 c47; Northern Ireland (St Andrews Agreement) Act 2006 c53

²³ The “step-by-step” approach was never absolute and would be abandoned in many areas of policy other than social security – see D Birrell and A Murie, ‘Ideology, conflict and social policy’ (1975) 4(3) *Journal of Social Policy* 243

²⁴ J Craig HC Deb 1 March 1929 vol 225 col 2361

²⁵ L Lundy, ‘Parity, parrotry or plagiarism? Legislating for the unemployed poor in Northern Ireland 1838-1995’ in N Dawson, D Greer and P Ingram (eds), *One hundred and fifty years of Irish law* (SLS Legal Publications, 1996) 7

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what might retrospectively be described as a vision of social citizenship at the level of the nation state was also influential.²⁶

Inclusion of social insurance in the “step-by-step” approach quickly became problematic. Although it was suggested during Parliamentary debates prior to devolution that both of the envisaged new Irish governments, particularly the southern government in Dublin, were likely to be chronically underfunded, the Government of Ireland Act 1920 provides for the transfer of monies *from* the devolved regions to central government in part-payment for the so-called “Imperial services,” or those functions reserved to Westminster.²⁷ In the event, Northern Ireland was never in a position to pay the Imperial contribution at the level envisaged.²⁸ Instead, the post-war collapse of traditional industries, soaring unemployment and the commitment to make unemployment insurance available on the same terms and at the same rate as in Great Britain brought the region to the brink of bankruptcy. By 1925, the unemployment insurance fund in a region whose entire annual budget was around £5 million was running a deficit of £3.6 million.²⁹ Estimates suggest the theoretically self-financing fund would have been sustainable

²⁶ The term “social citizenship” is associated with the writings of TH Marshall from 1949 onward, but the notion that all UK citizens should have access to a common set of social entitlements can be traced back to the decades immediately following the Union with Ireland Act 1800 c67 – see TH Marshall, ‘Citizenship and social class’ in TH Marshall and T Bottomore, *Citizenship and Social Class* (Pluto, 1992); JP McGauran, ‘Intellectual conflict and the Irish poor law question in the 1830s’ (PhD thesis, University of Ulster, 2010)

²⁷ Government of Ireland Act 1920 c67 s21-25; see, for example, G Wyndham, HC Deb 8 May 1912 vol 38 col 429

²⁸ RJ Lawrence, *The government of Northern Ireland: public finance and public services 1921-1964* (Clarendon Press, 1965) 42 and 50; S Livingstone and J Morison, ‘An audit of democracy in Northern Ireland’ (1995) 337 *Fortnight* 3, 16 suggest that Northern Ireland effectively never paid *any* Imperial contribution, although this is disputed by D Savory, HC Deb 28 February 1949 vol 462 col 63, 65

²⁹ RJ Lawrence, *The government of Northern Ireland: public finance and public services 1921-1964* (Clarendon Press, 1965) 42 and 50; Great Britain’s unemployment insurance fund would face its own solvency crisis within a decade – see HC deb 18 February 1931 vol 248 col 1263-1391

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up to an unemployment rate of 5.3%; the actual rate of unemployment in June 1920 was 25.4%.³⁰

In 1926,³¹ the devolved government negotiated a bail-out and *temporary* subsidy of the fund. The UK government undertook to make good any gap between unemployment insurance contributions collected in Northern Ireland and 2.2% of total UK contributions, plus 75% of any expenditure above this level.³² This short-term arrangement was placed on a more permanent footing in 1929³³ and periodically re-ratified thereafter.³⁴ The aspiration of the Prime Minister of Northern Ireland to a settlement that would “preserve the same standard of living amongst the population [of Northern Ireland] as prevails on the other side” thus appeared to be realised.³⁵ Today, the UK Exchequer subsidises contributory benefits by transferring between the national insurance funds for Great Britain and Northern Ireland such sums as are necessary to maintain the balance in the Northern Ireland fund at 2.84% of the combined total (£334 million transferred in 2012-13) and by funding non-contributory benefits in their entirety (£2.9 billion in 2012-13).³⁶

Although the fiscal arrangements described were initially put in place to *facilitate* the provision of a key service at the same level and on the same terms in Northern

³⁰ L Lundy, ‘Parity, parrotry or plagiarism? Legislating for the unemployed poor in Northern Ireland 1838-1995’ in N Dawson, D Greer and P Ingram (eds), *One hundred and fifty years of Irish law* (SLS Legal Publications, 1996)

³¹ Lord Arnold, HL Deb 23 March 1926 vol 63 col 748

³² Unemployment Insurance (Northern Ireland Agreement) Act 1926 c4

³³ Unemployment Insurance (Northern Ireland Agreement) Act 1929 c18

³⁴ For example, Unemployment and Family Allowances (Northern Ireland Agreement) Act 1946 c3; Social Services (Northern Ireland Agreement) Act 1949 c23

³⁵ J Craig, HC Deb (NI) 1925, vol 6 col 468

³⁶ HM Revenue and Customs, ‘Northern Ireland national insurance fund account for the year ended 31 March 2013’ (HC 894, TSO, 2013) 2, 11; Department for Social Development, ‘Resource accounts for the year ended 31 March 2013’ (DSD, 2013); despite the subvention, payments from the NI national insurance fund exceeded receipts by £255 million

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Ireland as in Great Britain, the notion that the transfers were *contingent* on the effective maintenance of a single social security system, separately administered, for the whole of the UK is evident from a relatively early stage.³⁷ The position that policy divergence would put at risk the subvention, or otherwise incur excessive extra costs, has been maintained to the present by senior civil servants and Ministers.³⁸ Although the devolved status of social security means Northern Ireland is not usually covered by the main provisions of Acts of Parliament in the field, in most cases the regional legislature has effectively replicated legislation passed at Westminster. Devolved governments' acceptance of the notion that they had "little real decision making" to do in the field of social security³⁹ extends to the vote in the final months of the Northern Ireland Parliament that future social security legislation for Northern Ireland could take the form of order in council, removing elected representatives' ability to make amendments⁴⁰ and leading Bradshaw to question whether devolution of competence has served any purpose at all.⁴¹ The suspension of legislative devolution for most of the period from 1972 to 2007, despite the continuation of administrative devolution, served to further entrench parity and convergence across fields in both operational and policy matters,⁴² although some authors argue that the

³⁷ WS Morrison, HC Deb 5 March 1936 vol 309 col 1684; J Lawson, HC Deb 5 March 1936 vol 309 col 1686

³⁸ N Dugdale in NIA HSS Committee, *General briefing on the functions of the DHSS* (NIA 3 Feb 1983) 2; M Ritchie in Committee for Social Development, *Pensions Bill* (Official Report 8 November 2007); P Robinson, NIA Deb 9 October 2012 vol 78 no 2 p18

³⁹ S Livingstone and J Morison, 'An audit of democracy in Northern Ireland' (1995) 337 *Fortnight* 3, 16

⁴⁰ Social Services Parity Act (NI) 1971 c21 s1

⁴¹ J Bradshaw, 'Social security parity in Northern Ireland' (Policy Research Institute, 1989) 22

⁴² J Morison and S Livingstone, *Reshaping public power: Northern Ireland and the British constitutional crisis* (Sweet and Maxwell, 1995) 154; S Turner, 'Transforming environmental governance in Northern Ireland. Part one: the process of policy renewal' (2006) 18 *Journal of Environmental Law* 55, 61; D Birrell, 'The reform agenda in the Northern Ireland Civil Service: the influences of parity, integration, devolution and direct rule' (2007) 22 *Public Policy and Administration* 275, 282

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extent to which this was the case can be overstated.⁴³ During periods of devolved government since 1998, social security Bills have tended to pass through the Assembly by the accelerated passage procedure, under which the committee stage is skipped, reducing the intensity of scrutiny, although this approach has not been uncontroversial⁴⁴ and has been abandoned for the current Welfare Reform Bill.⁴⁵

It would be misleading to claim that an absolute parity with Great Britain had been maintained in every respect of social security policy in Northern Ireland. The reduction of family allowance payments to large families in the region in 1956 has been described as having “clear religious undertones”⁴⁶ given the typically larger family size in the Catholic community at the time. Residence tests for certain benefits have also been more onerous, with the objective of deterring migration of claimants from the Irish Free State and Republic of Ireland.⁴⁷ While not affecting the level of benefit payable, the system for recovery of debts to public authorities from benefit claimants in Northern Ireland allowed deduction of a higher proportion of benefit income than was the case in Great Britain⁴⁸ and procedural differences have existed

⁴³ P Carmichael, ‘The Northern Ireland Civil Service: characteristics and trends since 1970’ (2002) 80(1) Pub Admin 23, 31 argues that no Northern Ireland administration has ever practised “slavish adoption of what is formulated in Great Britain,” albeit that convergence and divergence appear to varying degrees in different policy areas

⁴⁴ See Committee for Social Development, *Pensions Bill* (Official Report 8 November 2007); Committee for Social Development, *Pensions Bill: accelerated passage* (Official Report 8 September 2011)

⁴⁵ NIA Bill 13/11-15

⁴⁶ D Birrell and A Murie, ‘Ideology, conflict and social policy’ (1975) 4(3) Journal of Social Policy 243, 250

⁴⁷ T Fahey and E McLaughlin, ‘Family and state’ in AF Heath, R Breen and CT Whelan (eds), *Ireland north and south: perspectives from social science* (Proceedings of the British Academy ’98, Oxford University Press, 1999) 128; N Yeates, E McLaughlin and G Kelly, ‘Social security in Ireland, north and south’ in Yeates, N and Kelly, G, *Poverty and social security: comparing Ireland, north and south* (seminar hosted by Statistics and Research Branch, DSD and Social Security Research Group, Dundalk, November 2001) 2.2

⁴⁸ E Evason, ‘Poverty in Northern Ireland’, (1986) 75(300) An Irish Quarterly Review 503

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in the appeals process.⁴⁹ Finally, because council tax does not exist in Northern Ireland, neither does council tax benefit, with an additional element of housing benefit to cover domestic rates fulfilling the same purpose.⁵⁰ While some further administrative differences have existed, social security legislation in Northern Ireland has sought to maintain conformity with the system in Great Britain by imitating the latest reforms there, up to and including the Welfare Reform Bill currently before the Assembly.

4. Contesting parity

As highlighted in section 3, Unionist desire for parity in social security underwritten by the UK government can be linked with a political aspiration for full reintegration into the unitary state and with the unaffordability of a shared approach to an economically weaker region. However, arguments in favour of the arrangement can also be characterised as appeals to a shared UK social citizenship. These include the assertion that citizens of Northern Ireland, being subject to the same tax regime as those in Great Britain, should enjoy the same standard of services;⁵¹ that the fluidity of migration between the two jurisdictions required similar levels of social protection, as less generous provision in Northern Ireland would result in mass flight to Great Britain;⁵² and that the UK was simply bound to “preserve the same standard

⁴⁹ G McKeever, ‘Reforming social security appeal tribunals in Northern Ireland: parity whether we Leggatt or not?’ (2010) 17(2) Journal of Social Security Law 71

⁵⁰ D Birrell and D Heenan, ‘Devolution and social security: the anomaly of Northern Ireland’ (2010) 18(3) J Poverty and Soc Justice 281, 288

⁵¹ G Hall, HC Deb 21 November 1946 vol 430 col 1135; G Hall, HC Deb 22 February 1949 vol 461 col 1745; although RJ Lawrence, *The government of Northern Ireland: public finance and public services 1921-1964* (Clarendon Press, 1965) 48 questions whether the tax system in Northern Ireland genuinely was the same as that in Great Britain

⁵² W Churchill, HC Deb 9 March 1926, vol 192 col 2165; M Samuel, HC Deb 1 March 1929 vol 225 col 2374; W Smiles, HC Deb 22 February 1949 vol 461 col 1743; in contrast, but also in

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of living amongst the population [of Northern Ireland] as prevails on the other side.”⁵³ Parallels can be drawn with wider claims that the “social solidarity or fraternité” that underpins the welfare state is “national in character”⁵⁴ and that social security benefits should be centrally controlled on cost grounds and because regional control would result in either migration to areas with more generous benefits or a “race to the bottom.”⁵⁵

Assessments of the merits or otherwise of parity in Northern Ireland have, however, tended to be from a more explicitly regional perspective. For the lifetime of the devolved Parliament after 1926, by far the dominant assessment of the arrangements could be characterised by that of a former Prime Minister:

*Perhaps the most important item for the people of this country is the agreed parity in social services and in other matters which exists between ourselves and our kinsmen across the water. It has meant prosperity. It has meant the removal of fear and want from many homes.*⁵⁶

The consensus around the merits of parity begins to erode in both academic and political discourses during and after the unsuccessful attempt to restore devolved government in the 1980s. It is possible to question why social security should be a

favour of parity, J Craig, HC (NI) Deb 22 September 1931 vol 13 col 1945 warns that payment of more generous benefits in Northern Ireland could result in migration from Great Britain

⁵³ J Craig, HC Deb (NI) 1925, vol 6 col 468

⁵⁴ R (On the Application of Carson) v Secretary of State for Work and Pensions; R (On the Application of Reynolds) v Secretary of State for Work and Pensions [2005] UKHL 37 para 18 (Lord Hoffmann)

⁵⁵ KC Wheare, *Federal government* (Greenwood Press, 1963) 156; PE Peterson, The price of federalism (Twentieth Century Fund, 1995) 121; T Iversen, ‘Democracy and capitalism’ in FG Castles, S Leibfried, J Lewis, H Obinger and C Pierson (eds), *The Oxford handbook of the welfare state* (Oxford University Press, 2010) 191; P Sutherland, ‘Social security law and administration from an Australian perspective’ (Ulster Law Clinic seminar, Belfast, 13 June 2013)

⁵⁶ B Brooke, HC (NI) Deb 2 March 1949 vol 33 col 37; some dissent from opposition MPs is apparent in HC (NI) Deb 6 July 1971 vol 82 col 484

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special case when a shared UK citizenship has not necessarily guaranteed equality for residents of Northern Ireland with those of Great Britain in a range of other areas of social policy, including non-health social services, housing, divorce, abortion, homosexuality and gambling.⁵⁷ Further, it has been argued that parity of output in social security benefits does not necessarily equate to parity of outcome in terms of citizens' living standards if economic circumstances differ.⁵⁸ Finally, it has been claimed that other aspects of the particular circumstances of Northern Ireland have rendered direct transposition of the approach in Great Britain inappropriate. Overall, the view that continued adherence to the parity principle "cannot simply be justified by default" has gained strength.⁵⁹

Payment of cash benefits at the same level throughout the UK has been found not to result in equivalence of living standards between Northern Ireland and Great Britain because of the former's higher energy and food costs and less widespread occupational pension coverage.⁶⁰ Although the House of Lords has rejected the claim that supplementary benefit should be paid at a higher rate in areas of Great Britain with a particularly high cost of living,⁶¹ this would not necessarily preclude devolved legislators setting higher rates in Northern Ireland's separate system, were it not for the perceived barrier of parity. Proposed reforms in the 1980s were suggested to

⁵⁷ D Birrell and A Murie, 'Ideology, conflict and social policy' (1975) 4(3) Journal of Social Policy 243, 251

⁵⁸ J Bradshaw, 'Social security parity in Northern Ireland' (Policy Research Institute, 1989)

⁵⁹ G McKeever, 'Reforming social security appeal tribunals in Northern Ireland: parity whether we Leggatt or not?' (2010) 17(2) Journal of Social Security Law 71, 77

⁶⁰ E Evason, 'Poverty in Northern Ireland' (1986) 75(300) An Irish Quarterly Review 503; see also G Horgan, 'Devolution, direct rule and neo-liberal reconstruction in Northern Ireland' (2006) 26(3) Critical Social Policy 656, 660; N Yeates, E McLaughlin and G Kelly, 'Social security in Ireland, north and south' in Yeates, N and Kelly, G, *Poverty and social security: comparing Ireland, north and south* (seminar hosted by Statistics and Research Branch, DSD and Social Security Research Group, Dundalk, November 2001) 2.2

⁶¹ McDougall v Secretary of State for Social Services; McIntyre v Secretary of State for Social Services [1981] SC (HL) 23

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conflict with Anglo-Irish Agreement provisions on “the avoidance of economic and social discrimination”⁶² by having a more negative impact on Northern Ireland’s Catholic community, with its higher level of benefit dependence as a result of historic discrimination.⁶³ More recently, increased emphasis on lone parents’ obligation to seek paid employment may sit uneasily alongside Northern Ireland’s poor childcare provision.⁶⁴ Politically, specific departures from the approach in Great Britain were suggested under the 1980s Assembly, including a special rate of supplementary benefit for the long term unemployed, a regional fuel benefit⁶⁵ and changes to proposed housing benefit reforms.⁶⁶

Under the current Assembly, critics of parity in social security provision could initially be characterised as rare back-bench voices,⁶⁷ although McKeever’s study of tribunal reform highlights potentially greater acceptance of the scope for divergence in administrative and procedural matters.⁶⁸ Disquiet has now become more widespread, dividing the main parties in the devolved Executive. The Committee for Social Development has adopted a more proactive approach to scrutiny of social security Bills, no longer accepting accelerated passage, since the transfer of the

⁶² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ireland (Treaty series no 62, 1985, Hillsborough, 15 November 1985)

⁶³ E Evason, ‘Poverty in Northern Ireland’ (1986) 75(300) *An Irish Quarterly Review* 503, 512

⁶⁴ G Horgan and M Monteith, ‘What can we do to tackle child poverty in Northern Ireland?’ (Joseph Rowntree Foundation, 2009); NIWRG, ‘Welfare Reform Bill second reading House of Lords: joint briefing’ (NIWRG, 2011) 6; AM Gray and D Birrell, ‘Coalition government in Northern Ireland: social policy and the lowest common denominator approach’ (2012) 11(1) *Social Policy and Society* 15, 22

⁶⁵ NIA HSS Committee, *Report: social security parity* (NIA 141-I, 26 June 1984) 5.3

⁶⁶ NIA HSS Comm, Report on proposal for a draft Housing Benefits (NI) Order (NIA51, 11 May 1983) 6.8; see also appendix 2 (Minutes of Evidence) in which witness N Raynsford suggests Northern Ireland could act as a testing ground for a revised system that could later be rolled out to Great Britain

⁶⁷ NI Assembly Social Development Committee, ‘Report on the Carer’s Allowance Bill’ (NIA 13/07), 21 March 2011

⁶⁸ G McKeever, ‘Reforming social security appeal tribunals in Northern Ireland: parity whether we Leggatt or not?’ (2010) 17(2) *Journal of Social Security Law* 71, 77

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chair's role from the Democratic Unionist Party to nationalist Sinn Féin.⁶⁹ The committee's report recommends a number of departures from the 2012 Act, including retention of the current rate of the disability element of child tax credit, consideration of a severe disability premium, possible changes to the sanctions regime, removal of the under-occupancy penalty in housing benefit ('bedroom tax') and extension of the duration of contributory employment and support allowance.⁷⁰ An ad-hoc committee was also appointed to consider the equality and human rights implications of the Bill.⁷¹ Although this concluded by majority vote that no specific breaches could be identified, the present author has argued elsewhere that the human rights compliance of some elements of the reforms can be questioned.⁷²

That recent UK government reforms should generate political concern in Northern Ireland should come as no surprise due to the greater impact there than in any other region. In August 2014, both the claimant count for unemployment-related benefits and the economic inactivity rate were higher in Northern Ireland (5.9% and 27.1%) than in any other UK region (average 2.9%, 22.1%), the former having been the highest or second-highest in the UK for 53 consecutive months. Consequently, changes to social security policy under both New Labour and the coalition will

⁶⁹ The current committee chair has been publicly critical of the Welfare Reform Bill from an early stage – see M Purdy, 'Assembly row breaks out over welfare reform plans' (*BBC News*, 4 October 2012) <<http://www.bbc.co.uk/news/uk-northern-ireland-19836040>> accessed 21 November 2012; A Maskey, NIA Deb 9 October 2012 p 49

⁷⁰ Committee for Social Development, 'Report on the Welfare Reform Bill (NIA Bill 13/11-15)' (NIA 74/11-15, NI Assembly, 2013)

⁷¹ Ad-hoc Committee, 'Report on whether the provisions of the Welfare Reform Bill are in conformity with the requirements for equality and observance of human rights' (NIA 92/11-15, NI Assembly, 2013)

⁷² M Simpson, "'Designed to reduce people... to complete destitution': human dignity in the active welfare state' (Justice and dignity under challenge: CCJHR annual conference, Cork, June 2014) <https://www.academia.edu/7133616/_Designed_to_reduce_people_to_complete_destitution_human_dignity_in_the_active_welfare_state> accessed 8 August 2014

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collectively result in a per capita loss of £650 to the regional economy (average £470).⁷³ However, these figures alone do not wholly explain why parity should face its strongest challenge at this time. Additional factors may include the shifting political balance of power as single-party Unionist rule has given way to power sharing with a place in government for nationalists and republicans. As the minimisation of policy differences between Northern Ireland and Great Britain was seen in an earlier era to serve unionist interests, so republicans might perceive that it is in their interests to emphasise Northern Ireland's separateness from Great Britain through pursuit of policy divergence.⁷⁴ Sinn Féin, which contests elections in both parts of Ireland, may also see resistance to "Tory cuts" more generally from within government in Northern Ireland⁷⁵ as an electoral necessity given its criticism of spending cuts implemented by the government of the Republic of Ireland, where it is an opposition party.⁷⁶

Whatever the reasons, Ministers from the DUP and Sinn Féin have had difficulty reaching agreement for the return of the Welfare Reform Bill to the Assembly following committee stage, primarily due to a divergence of opinion as to whether

⁷³ C Beatty and S Fothergill, 'The impact of welfare reform on Scotland' in Welfare Reform Committee, *The impact of welfare reform on Scotland* (SP paper 303, Scottish Parliament, 2013); C Beatty and S Fothergill, 'The impact of welfare reform on Northern Ireland' (NICVA, 2013); NISRA, 'Statistical press release: labour market statistics – September 2014' (DETI, 2014)

⁷⁴ This position is not explicitly stated, but parallels can be seen in the historic attitudes of unionist and nationalist politicians to formal cross-border bodies, albeit the extent to which either side depicts cross-border cooperation as a pathway to unification has lessened – see E Tannam, 'Cross-border cooperation between Northern Ireland and the Republic of Ireland: neo functionalism revisited' (MFPP ancillary papers no 1/IBIS working paper no 40, Institute for British-Irish Studies/Institute of Governance, 2004)

⁷⁵ D Birrell and AM Gray, 'A view from Northern Ireland' in N Yeates, T Haux, R Jawad and M Kilkey (eds), *In defence of welfare: the impacts of the spending review* (Social Policy Association, 2011) 49

⁷⁶ This is illustrated by a criticism of Sinn Féin's record in government from a rival party in the Republic of Ireland – see M McCarthy, 'Sinn Féin must justify support for €200m cuts in Northern Ireland' (Labour, 5 August 2014) <<http://www.labour.ie/press/2014/08/05/sinn-fein-must-justify-support-for-200-million-cut/>> accessed 27 September 2014

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parity should be maintained.⁷⁷ Although committee stage was completed in February 2013, by November 2014 a date for consideration stage had yet to be set.⁷⁸ The agreement of the two main parties on a draft Budget in November 2014 may be interpreted as implying that the Bill is now likely to progress, given the additional costs that would be incurred by further inaction, although at the time of writing this is not certain.⁷⁹ It appears that universal credit in Northern Ireland, should full implementation ever come to pass, *will* differ operationally from in Great Britain, with its housing element being paid directly to landlords, greater scope for splitting payments to joint claimants and the option of fortnightly payments.⁸⁰ More substantive divergence, advocated by Sinn Féin,⁸¹ has largely been resisted by the First, Finance and Social Development Ministers (all DUP), primarily on cost grounds, although recent communication with religious leaders has indicated that Northern Ireland will follow Scotland and Wales in devising measures to reduce the impact on housing benefit claimants of the new social sector size criteria ('bedroom tax') and

⁷⁷ L Clarke, 'Sinn Féin "reneged on welfare pledge" – Wilson anger at £5m monthly coast (sic) of impasse' (Belfast Telegraph, 17 February 2014) <<http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/sinn-fein-reneged-on-welfare-pledge-wilson-anger-at-5m-monthly-coast-of-impasse-30015570.html>> accessed 17 March 2014

⁷⁸ The legislative process in the Northern Ireland Assembly consists of first reading, second reading, committee stage, consideration stage, further consideration stage, final stage, royal assent – see NI Assembly, 'Welfare Reform Bill' (NI Assembly, 2014) <<http://www.niassembly.gov.uk/Assembly-Business/Legislation/Primary-Legislation-Current-Bills/Welfare-Reform-Bill/>> accessed 8 November 2014

⁷⁹ NIA Deb 3 Nov 2014 vol 99 no 1 p5

⁸⁰ G McKeever, 'Welfare reform and devolution' (2013) 20(3) Journal of Social Security Law 100

⁸¹ D Birrell and AM Gray, 'A view from Northern Ireland' in N Yeates, T Haux, R Jawad and M Kilkey (eds), *In defence of welfare: the impacts of the spending review* (Social Policy Association, 2011) 49; A Maskey, 'Sinn Féin calls for deferral of the Welfare Reform Bill' (Sinn Féin, 4 October 2012) <<http://www.sinnfein.ie/contents/24642>> accessed 17 March 2014

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may limit the maximum duration of sanctions to two years, compared to three in Great Britain.⁸²

5. A new approach?

The extent to which the merits of parity have been questioned and the current impasse in the Executive raise the prospect of a new approach to social security policy formation in Northern Ireland, under which adherence to models developed for Great Britain no longer dominates. Whether this would result in a genuinely new approach to social security in Northern Ireland is less certain: although the Assembly could vote in favour of divergence, this might simply take the form of the continuation of elements of former policy. Alternatively, abandonment of parity could occur by default, with failure to agree on *any* new legislation for Northern Ireland ahead of full implementation of the 2012 Act in Great Britain resulting in one region continuing with the pre-2012 system while others move on. Such a pathway would hardly be unprecedented: McEwan gives an overview of divergence resulting from “the Scottish Executive’s refusal to pursue some of the UK government’s more radical policy initiatives.”⁸³

What would once have been all but unthinkable must now be considered a more realistic proposition. It is not only in Northern Ireland that recent UK government policy has provoked disquiet: the Scottish government has described the 2012 Act as

⁸² P Robinson, NIA Deb 9 October 2012 p18; Committee for Social Development, *Welfare Reform Bill: Ministerial briefing* (Official Report, NI Assembly, 31 January 2013); S Hamilton, NIA Deb 21 January 2014 vol 91 no 2 p3-4, 8-10; M Storey, ‘Letter to the church leaders’ group – impacts of welfare reform’ (DSD, 2014) <<http://www.dsdni.gov.uk/church-leaders-group-oct14.pdf>> accessed 8 November 2014

⁸³ N McEwan, ‘The territorial politics of social policy development in multilevel states’ (2005) 15(4) *Regional and Federal Studies* 537, 542; see also G Mooney and L Poole, “‘A land of milk and honey’? Social policy in Scotland after devolution’ (2004) 24(4) *Critical Social Policy* 458

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“pernicious,” while Welsh Ministers have indicated that they, too, would favour an alternative approach given devolved competence.⁸⁴ Regional or even local control of benefits that in the UK would be considered part of the social security system, subject to varying degrees of central restraint, is a reality in various other countries, as in the case of social assistance in Norway, Spain and Germany.⁸⁵ Lodge and Trench argue that neither the “welfare unionist” desire for continued central control of every aspect of social security nor the “welfare nationalist” aspiration for total regional control of the welfare state reflects the reality of an already-well established tiered social citizenship within the devolutionary state or the fact that the most appropriate locus of responsibility may vary between benefits.⁸⁶ Perhaps most pertinently, the major UK political parties appear less “deeply committed” to a continued shared approach to social security.⁸⁷ This is reflected in public endorsement of the devolution of an unspecified measure of competence for “welfare,” presumably referring (as in the Welfare Reform Acts) to social security, to Scotland following voters’ rejection of independence in the September 2014

⁸⁴ J Cuthbert and V Gething, ‘Written statement – tackling poverty action plan 2013’ (Welsh Government, 2013)

<<http://wales.gov.uk/about/cabinet/cabinetstatements/2013/tacklingpoverty/?lang=en>> accessed 14 April 2014; N Sturgeon, ‘Foreword from the Deputy First Minister’ in Scottish Government, ‘Child poverty strategy for Scotland: our approach 2014-2017’ (Scottish Government, 2014) 3; see also N Sturgeon, Scot Parl deb 22 December 2011 session 4 col 4941, 4943

⁸⁵ See J Ditch, J Bradshaw, J Clasen, M Huby and M Moodie, *Comparative social assistance: localisation and discretion: studies in cash & care* (Ashgate, 1998); A Arriba and L Moreno, ‘Spain – poverty, social exclusion and “safety nets”’ in M Ferrera (ed), *Welfare state reform in southern Europe: fighting poverty and social exclusion in Italy, Spain, Portugal and Greece* (Routledge, 2005); K Mohr, *Soziale Exklusion im Wohlfahrtsstaat: Arbeitslosensicherung und Sozialhilfe in Großbritannien und Deutschland* (VS Verlag für Sozialwissenschaften, 2007)

⁸⁶ G Lodge and A Trench, ‘Devo more and welfare: devolving benefits and policy for a stronger union’ (IPPR, 2014)

⁸⁷ Scotland Office, ‘Scotland’s future in the United Kingdom: building on ten years of Scottish devolution’ (Cm 7738, Scotland Office, 2009) 4

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referendum⁸⁸ and in the transfer to local or regional governments of responsibility for support previously provided by central government through the social fund and council tax benefit.⁸⁹

If this confluence of events means the prospects of abandonment of parity look greater than at any time since 1926, the implications of such a development beg consideration. Most prominent, given the importance of finances in the establishment of and as a driver of continuing unionist support for the parity convention, are the fiscal implications. A previous Social Development Minister, not uncritical of UK government policy, has expressed concern that the entirety of the financial support Northern Ireland's social security system receives from Westminster would be "put on the table" in the event of policy divergence entailing higher costs.⁹⁰ While this analysis can be questioned, it does seem certain that any *additional* costs incurred as a result of a distinctive approach in Northern Ireland would have to be covered from regional funds; this might include additional IT costs if divergence occurred to the extent that shared systems could no longer be used. The additional social security expenditure incurred as a result of non-implementation of the reforms introduced in Great Britain by the Welfare Reform Act 2012 has resulted in £15 million from the block grant being returned to the Treasury in 2013-14 and £87 million in 2014-14, with potential future costs estimated by the Finance

⁸⁸ HM Government, 'The parties' published proposals for further devolution for Scotland' (Cm 8946, HMSO, 2014)

⁸⁹ Welfare Reform Act 2012 c5 s70; Local Government Finance Act 2012 c17 s10; Council Tax Reduction (Scotland) Regulation 2012 no 303; Council Tax Reduction Schemes and Prescribed Requirements (Wales) Regulations 2012 no 3144 (W 316); Department for Work and Pensions, 'Local support to replace community care grants and crisis loans for living expenses in England: government response to the call for evidence' (DWP, 2011); C Grover, 'Abolishing the discretionary social fund: continuity and change in relieving "special expenses"' (2012) 19(1) Journal of Social Security Law 12

⁹⁰ A Attwood, NIA AQO 712/11

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Minister at £200 million per year if Northern Ireland continues to retain the status quo,⁹¹ repayments typically described in the regional media as “fines.”⁹² Even if the necessary funds to make good the shortfall could be raised in-region – perhaps challenging given Northern Ireland’s limited revenue-raising capacity⁹³ – the Treasury has the power to reduce the block grant by an equivalent amount if it deems that self-financed devolved expenditure has increased “significantly more rapidly than comparable expenditure in England... in such a way as to threaten targets set for public expenditure as part of the management of the United Kingdom economy.”⁹⁴ Whether or how this power might be used in practice is unclear: the Treasury itself states only that in such circumstances “United Kingdom Ministers [would] need to take a view on whether and how to adjust this funding.”⁹⁵ It seems more certain that any devolved level policy resulting in *reduced* social security expenditure would deliver no financial benefit to the region under present arrangements as any savings would be retained centrally, as with the attendance allowance payments saved in Scotland as a result of the introduction of (regionally funded) free social care.⁹⁶

⁹¹ S Hamilton, NIA Deb 21 January 2014 vol 91 no 2 p3-4, 8-10; S Hamilton, NIA Deb 13 October 2014 vol 98 no 3 p40

⁹² See, for example, J Campbell, ‘Why Stormont is deadlocked over budget and welfare reform’ (BBC News, 29 August 2014) <<http://www.bbc.co.uk/news/uk-northern-ireland-28982792>> accessed 27 September 2014

⁹³ The regional rate accounts for just five per cent of the funds available to the devolved Executive, the block grant 93% – see PriceWaterhouseCooper, ‘Fiscal powers: a review of the fiscal powers of the Northern Ireland Assembly’ (NICVA, 2013) 17; the continued precarity of devolved finances is illustrated by the £100 million loan granted by central government in October 2014 – see S Hamilton, NIA Deb 13 October 2014 vol 98 no 3 p41

⁹⁴ HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: statement of funding policy* (HM Treasury, 2010) 11

⁹⁵ HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: statement of funding policy* (HM Treasury, 2010) 17

⁹⁶ Community Care and Health (Scotland) Act 2002; R Parry, ‘Devolution and social security in Scotland’ (2004) 12(3) *Benefits* 169, 173

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If, despite the considerable fiscal obstacles, the decision were taken to abandon parity as the overriding principle of social security in Northern Ireland, the question would arise of the likely direction of future policy. First, the devolved legislatures operate in a somewhat different legal context than does Parliament. Whereas the Human Rights Act 1998 enables a court to declare an Act of Parliament incompatible with the European Convention of Human Rights,⁹⁷ but not to invalidate the offending provision,⁹⁸ any incompatible Act of a devolved legislature would be outside its competence and therefore invalid.⁹⁹ Although ECHR is sometimes portrayed as of limited relevance to social and economic rights,¹⁰⁰ devolved institutions would be subject to an absolute obligation to comply with relevant provisions (notably article 3, article 8 and P1-1) in social security legislation which does not apply to Parliament. These articles might point to a need to reconsider the severity of sanctions imposed on claimants who fail to comply with conditions attached to their benefit.¹⁰¹ Devolved institutions are also subject to a constitutional obligation to comply with international law more generally, whilst international agreements that have not been incorporated into domestic law do not bind Parliament, although here enforcement

⁹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950, entry into force of current text 1 June 2010, ETS005) (ECHR)

⁹⁸ Human Rights Act 1998 c42 s4, 10

⁹⁹ Scotland Act 1998 c46 s29(2)(d); Northern Ireland Act 1998 c47 s6(2)(c); Government of Wales Act 2006 c32 s81; in *Salvesen v Riddell* [2013] UKSC 22, Agricultural Holdings (Scotland) Act 2003 asp 11 s72(6) and (10) were held to be outside the competence of the Scottish Parliament as neither could be read in such a way as to be compatible with ECHR; s72(6) was invalidated with immediate effect, while the effect of the judgment on s72(10) was suspended for one year to allow the Scottish Parliament to take remedial action

¹⁰⁰ R O’Gorman, ‘The ECHR, the EU and the weakness of social rights protection at the European level’ (2011) 12(10) German Law Journal 1833

¹⁰¹ M Simpson, ‘“Designed to reduce people... to complete destitution”: human dignity in the active welfare state’ (Justice and dignity under challenge: CCJHR annual conference, Cork, June 2014)

<https://www.academia.edu/7133616/_Designed_to_reduce_people_to_complete_destitution_human_dignity_in_the_active_welfare_state> accessed 8 August 2014

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is in the hands of the Secretary of State rather than the courts.¹⁰² Some provisions of the international agreements on socio-economic rights might gain judicial weight in Northern Ireland in the event of the enactment of a Bill of Rights in line with the recommendations of the Northern Ireland Human Rights Commission,¹⁰³ but for political reasons this currently appears a remote prospect.¹⁰⁴

Ultimately, any change to social security law in Northern Ireland would be the result of a political process. The characteristics of that process and of the actors involved are unique within the UK. Northern Ireland has not been associated with a history of “indigenous radicalism” or the “egalitarian and solidaristic myths” said to underpin to a significant extent the distinctive national identities of Scotland and Wales,¹⁰⁵ nor does its party system match the centre left government-centre left opposition typical of those regions.¹⁰⁶ For Greer, Northern Irish politics, dominated by ethno-religious identity, views on the constitutional status of the region and the choice between a

¹⁰² Scotland Act 1998 c46 s58; Northern Ireland Act 1998 c47 s26; Government of Wales Act 2006 c32 s82

¹⁰³ Northern Ireland Human Rights Commission, ‘A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland (NIHRC, 2008)

¹⁰⁴ For the UK government’s view of the NIHRC recommendations, see Northern Ireland Office, ‘A Bill of Rights for Northern Ireland: next steps’ (Consultation paper, NIO, 2009) 17;

¹⁰⁴ A Smith, M McWilliams and P Yarnell, ‘Political capacity building: advancing a Bill of Rights for Northern Ireland’ (Transitional Justice Institute, 2014)

¹⁰⁵ M Keating, ‘Social inclusion, devolution and policy divergence’ (2003) 74(4) Political Quarterly 429, 433; M Wright, ‘Wales and socialism: political culture and national identity c. 1880-1914’ (PhD thesis, Cardiff University, 2011); some authors suggest portrayals of Scotland and Wales as politically ‘left of England’ are exaggerated – see findings of surveys of public opinion on welfare and social security reported by N Pearce and E Taylor, ‘Government spending and welfare: changing attitudes towards the role of the state’ in A Park, C Bryson, E Clery, J Curtice and M Phillips (eds), *British social attitudes 30* (NatCen Social Research, 2013); ScotCen Social Research, ‘Do you agree or disagree that Government should redistribute income from better-off to less well off?’ in *What Scotland thinks: non-partisan information on attitudes to how Scotland should be governed* (ScotCen Social Research, 2013) <<http://whatscotlandthinks.org/questions/do-you-agree-or-disagree-that-government-should-redistribute-income-from-better-off-to-less-well-off>> accessed 17 February 2014

¹⁰⁶ N McEwan, ‘The territorial politics of social policy development in multilevel states’ (2005) 15(4) *Regional and Federal Studies* 537, 543; SL Greer, ‘The territorial bases of health policymaking in the UK after devolution’ (2005) 15(4) *Regional and Federal Studies* 501, 507

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“militant” and “moderate” party on either side of the unionist-nationalist divide,¹⁰⁷ “are not about public policy and it shows.”¹⁰⁸ If this is true of *electoral* politics, once in office politicians must grapple with the same issues as their counterparts elsewhere in the UK, but within the unique context of a consociational Executive whose members are drawn from (currently) five ideologically divergent parties representing different communal interests. The “lowest common denominator” thesis emphasises the difficulty of gaining agreement on any item of policy in such circumstances;¹⁰⁹ Ministers can act radically in fields not requiring legislation or Executive support, but where either of these is necessary a “policy impasse” frequently results,¹¹⁰ capable of resolution only through recourse to shared conservative social values and a focus on the “unambiguously deserving poor.”¹¹¹ In the absence of a shared ideology to underpin a common vision, and with a decision-making process that favours inertia, substantial innovation is rare, budgetary decisions are based on the political need to ensure no one party’s Ministers appear to be ‘losers’ and policy agendas inherited from direct rule tend to continue.¹¹² This

¹⁰⁷ J Garry, ‘Consociationalism and its critics: evidence from the historic Northern Ireland Assembly election 2007’ (2009) 28(3) Electoral Studies 458, 458; see also B Graham and C Nash, ‘A shared future: territoriality, pluralism and public policy in Northern Ireland’ (2006) 25 Political Geography 253

¹⁰⁸ SL Greer, ‘The territorial bases of health policymaking in the UK after devolution’ (2005) 15(4) Regional and Federal Studies 501, 510

¹⁰⁹ E McLaughlin, ‘Governance and social policy in Northern Ireland (1999–2002): the devolution years and postscript’, in M Powell, L Bauld and J Clarke (eds), *Social Policy Review 17, Analysis and Debate in Social Policy* (The Policy Press, 2005) 107; AM Gray and D Birrell, ‘Coalition government in Northern Ireland: social policy and the lowest common denominator approach’ (2012) 11(1) Social Policy and Society 15

¹¹⁰ AM Gray and D Birrell, ‘Coalition government in Northern Ireland: social policy and the lowest common denominator approach’ (2012) 11(1) Social Policy and Society 15, 16

¹¹¹ E McLaughlin, ‘Governance and social policy in Northern Ireland (1999–2002): the devolution years and postscript’, in M Powell, L Bauld and J Clarke (eds), *Social Policy Review 17, Analysis and Debate in Social Policy* (The Policy Press, 2005) 107

¹¹² C Paris, P Gray and G Muir, ‘Devolving housing policy and practice in Northern Ireland 1998–2002’ (2003) 18(2) Housing Studies 159; SL Greer, ‘The territorial bases of health policymaking in the UK after devolution’ (2005) 15(4) Regional and Federal Studies 501, 511;

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naturally limits the potential for policy divergence from Great Britain or England resulting from use of initiative at regional level, but may increase the potential for divergence resulting from non-adoption of reforms implemented by the UK government.¹¹³

6. Devolving social security: lessons from the Northern Ireland experience

As Scotland contemplates a revised devolution settlement including competence for social security, whose knock-on effects in Wales and Northern Ireland can only be guessed at, it is useful to consider what lessons can be learned from the experience of Northern Ireland, the one UK region where social security has been a devolved matter for almost a century. It is immediately clear that formal devolution of competence does not automatically result in substantive policy autonomy as other factors may impose constraints on the extent to which regional innovation is possible.

The primary constraint on Northern Ireland's freedom to develop its own social security policy has been fiscal. The experience of the 1920s demonstrates that a small, economically weak region cannot hope to offer public services, particularly such a costly service, at the same level as other regions on the strength of its own resources alone. This appears to remain applicable to Northern Ireland today. The regional national insurance fund received a transfer of £334 million from the fund for

AM Gray and D Birrell, 'Coalition government in Northern Ireland: social policy and the lowest common denominator approach' (2012) 11(1) Social Policy and Society 15, 21

¹¹³ G Horgan, Devolution, direct rule and neo-liberal reconstruction in Northern Ireland (2006) 26(3) Critical Social Policy 656

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Great Britain in 2012-13, but payments still exceeded receipts by £255 million.¹¹⁴

Non-contributory benefits, funded from general taxation by the UK Exchequer, outside the block grant for Northern Ireland, cost £2.2 billion the previous year compared to £79 billion for Great Britain,¹¹⁵ almost precisely in line with the region's share of population,¹¹⁶ but in a context of high levels of economic inactivity, high security costs, low earnings and low tax revenues that contribute to the largest gap in the UK between receipts and expenditure. Per capita public spending was 21% higher than the UK average in 2011-12, with per capita revenues 22% below average.¹¹⁷ This does not necessarily apply to Scotland, where both revenues and expenditure are higher than average, although the position of Wales is more analogous to that of Northern Ireland.

Any move towards a general devolution of competence for social security would therefore have to be accompanied by consideration of the most appropriate funding settlement in order to achieve genuine regional autonomy in the field. Current arrangements in Northern Ireland allow little space for significant divergence from Great Britain's approach without incurring prohibitive costs. A similar approach to

¹¹⁴ HM Revenue and Customs, 'Northern Ireland national insurance fund account for the year ended 31 March 2013' (HC 894, TSO, 2013) 2, 11

¹¹⁵ Social Security Agency, 'Annual report and accounts 2011-2012' (DSD, 2012); J Browne and A Hood, 'A survey of the UK benefit system' (BN13, IFS, 2012)

¹¹⁶ The population of Northern Ireland in mid-2013 was 1.8 million, 2.8% of the UK total of 64.1 million – see Office for National Statistics, 'UK population estimates 2013' (ONS, 2014) <<http://ons.gov.uk/ons/rel/pop-estimate/population-estimates-for-uk--england-and-wales--scotland-and-northern-ireland/2013/sty-population-estimates.html>> accessed 9 September 2014

¹¹⁷ 2012-13 is the first year in which tax receipts have been disaggregated by region. Department of Finance and Personnel, 'Labour market statistics bulletin: results from the Northern Ireland Annual Survey of Hours and Earnings 2012' (DFP, 2012); HM Treasury, 'Public expenditure: statistical analysis 2013' (Cmd 8663, HM Treasury, 2013); S Adam and H Miller, 'Observations: tax revenue in England, Scotland, Wales and Northern Ireland' (IFS, 2013) <<http://www.ifs.org.uk/publications/6881>> accessed 9 September 2014; D Rogers, 'Labour market bulletin 24' (DEL, 2013) 6

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the funding of some services nominally under regional control in Spain through ring-fenced grants is now less widely used, in part because it raised questions about the extent to which regional autonomy was illusory.¹¹⁸ Funding the service from regionally raised revenue alone could hardly but result in a diminution of provision in Northern Ireland and Wales, although the same does not apply to Scotland. Adding additional monies to the block grant would be appealing to Scotland, favoured by the Barnett formula used to calculate allocations, and to a lesser extent Northern Ireland, but would leave Wales underfunded.¹¹⁹ Meaningful autonomy might then depend on the negotiation of a new, more explicitly needs-based funding model more closely reflecting the (not always uncontroversial)¹²⁰ systems of inter-territorial solidarity in Spain and Germany,¹²¹ unlikely to be an easy progress given the perception of a

¹¹⁸ J Subirats and R Gallego, 'El análisis del rendimiento institucional: teoría y aplicación a los comunidades autónomas' in J Subirats and R Gallego (eds), *Veinte años de autonomías en España: leyes, políticas públicas, instituciones y opinión pública* (Centro de Investigaciones Sociológicas, 2002); G Lopez-Casasnovas, J Costa-Font and I Planas, 'Diversity and regional inequalities in the Spanish "system of health care services"' (2005) 14 *Health Economics* 221

¹¹⁹ G Leicester, 'Scotland's parliament: fundamentals for a new Scotland Act' (UCL Constitution Unit, 1996) 65; Independent Commission on Funding and Finance for Wales, 'Funding devolved government in Wales: Barnett and beyond' (Independent Commission on Funding and Finance for Wales, 2009) 54; A Trench, 'Intergovernmental relations and social citizenship: opportunities Labour missed' in G Lodge and K Schmucker with A Coutts, *Devolution in practice 2010* (IPPR, 2010); A Trench, 'Finance and the devolution fiscal debates' (Knowledge Exchange Seminar Series, Stormont, October 2013)

¹²⁰ J Subirats, 'Multi-level governance and multi-level discontent: the triumph and tensions of the Spanish model' in SL Greer (ed), *Territory, democracy and justice: regionalism and federalism in western democracies* (Palgrave Macmillan, 2006) 194; LP Feld and T Baskaran, 'Federalism Commission II: recent reforms of federal-Länder financial relationships in Germany' (Ruprecht-Karls-Universität Heidelberg, 2009) available from <<http://www.forumfed.org/en/pubs/2009-10-26-feld.pdf>> accessed 29 April 2013; M Keating, 'Social citizenship, solidarity and welfare in regionalised and plurinational states' (2009) 13(5) *Citizenship Studies* 501, 508

¹²¹ Grundgesetz für die Bundesrepublik Deutschland Art 91a, 91b and 104a ; Constitution of Spain s157 and 158; C Jeffery, 'German federalism from cooperation to competition' in M Umbach (ed), *German federalism: past, present and future* (Palgrave, 2002) 177; KA Konrad and H Seitz, 'Fiscal federalism and risk sharing in Germany: the role of size differences' in S Cnossen and H-W Sinn, *Public finance and public policy in the new century* (MIT Press, 2003) 477; J Loughlin and S Lux, 'Subnational finances in Spain: lessons for the UK?' (Paper BoF 22, Cardiff University, 2008) 14

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former Northern Ireland Finance Minister that within HM Treasury “there are some people who think that we have too much money already.”¹²²

If the emergence of the parity convention in Northern Ireland can be linked to a significant extent to fiscal problems experienced in the 1920s, the importance of a UK-wide conception of social citizenship – that all citizens belong to a common sharing community and should be guaranteed a common minimum standard of living – has also been demonstrated. This also remains relevant today. Although little relevant research has been conducted in Northern Ireland,¹²³ literature points to a “devolution paradox” in Scotland and Wales whereby citizens aspire to increased devolved power but also favour continuation of risk pooling and uniformity in key services at national level.¹²⁴ From this perspective, a settlement resembling that in Northern Ireland might be capable of gaining public acceptance: essentially the same system could be maintained across the UK, underwritten by central government, with devolved administrations able to make minor (or, perhaps in Scotland, more major) tweaks in accordance with regional tastes or needs, provided they are able and willing to meet any extra costs this entails.

¹²² S Wilson, NIA Deb 21 January 2014 vol 91 no 2 p11; see also M Sandford, ‘What place for England in an asymmetrically devolved UK?’ (2002) 36(7) Regional Studies 789

¹²³ Questions on ‘welfare reform’ have not featured in the Northern Ireland Life and Times Survey since 2000 – see ‘Northern Ireland Life and Times Survey’ (Ark, 2013) <<http://www.ark.ac.uk/nilt/results/searchmod.html>> accessed 9 April 2014

¹²⁴ A Henderson, C Jeffery, D Wincott and R Wyn Jones, ‘Reflections on the “devolution paradox”: a comparative example of multilevel citizenship’ (2013) 47(3) Regional Studies 303; see also YouGov, ‘YouGov/Times survey results’ (YouGov, 2013); G Lodge and A Trench, ‘Devo more and welfare: devolving benefits and policy for a stronger union’ (IPPR, 2014) 12; C Timmins, A Blunt and L McAllister, ‘Commission on Devolution in Wales public opinion survey – non fiscal powers: research findings report’ (Beaufort Research, 2013) 31

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Of course, there are alternatives – better alternatives in the view of Lodge and Trench¹²⁵ – to the outright devolution of every aspect of social security to every region. In the devolutionary state the choice need not simply be between central and regional control of policy. Different approaches may be seen in Spain, where the autonomous communities may have competence for a particular field within parameters set by central government, as with education, or control a specific benefit, as with social assistance, while others remain centrally controlled.¹²⁶ Lodge and Trench suggest a model for devolution of social security involving regionalisation of the most suitable benefits – notably housing benefit – with regions able to ‘top up’ (some of) those remaining under central control should they wish. In a devolution settlement that is already in many respects asymmetrical, there is no firm reason why social security should necessarily be devolved to every region in the same manner and to the same extent.¹²⁷ Account could therefore be taken of Scotland’s stronger economic position and apparently greater political appetite for devolved competence.¹²⁸

¹²⁵ G Lodge and A Trench, ‘Devo more and welfare: devolving benefits and policy for a stronger union’ (IPPR, 2014)

¹²⁶ EM Hanson, ‘Democratisation and educational decentralisation in Spain: a 20 year struggle for reform’ (Country studies: education reform and management publication series 1(3), World Bank, 2000) 36; A Losada and R Máiz, ‘Devolution and involution: defederalisation politics through educational policies in Spain (1996-2004)’ (2005) 15(4) Regional and Federal Studies 437; A Arriba and L Moreno, ‘Spain – poverty, social exclusion and “safety nets”’ in M Ferrera (ed), *Welfare state reform in southern Europe: fighting poverty and social exclusion in Italy, Spain, Portugal and Greece* (Routledge, 2005)

¹²⁷ M Keating, ‘What’s wrong with asymmetrical government?’ (1998) 8(1) Regional and Federal Studies 195; M Sandford, ‘What place for England in an asymmetrically devolved UK?’ (2002) 36(7) Regional Studies 789

¹²⁸ Whereas a consensus that some measure of competence *will* be devolved to Scotland now appears to be established, submissions to the Silk Commission give no strong indication of a similar desire in Wales, while Northern Ireland’s First Minister has openly discussed the possibility of surrendering control of social security to the UK government – see Commission on Devolution in Wales, ‘Empowerment and responsibility: legislative powers to strengthen Wales’ (Commission on Devolution in Wales, 2013); N McAdam, ‘Peter Robinson: I’ll hand control of benefits back to Westminster if welfare row is not settled’ (Belfast Telegraph, 4

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Conclusion

The uncodified nature of the UK's constitution means that definitively establishing the rules governing how the state works can be a laborious process, requiring that a plethora of legislation, legal judgments, non-statutory rules and conventions be taken into account. At first glance, the devolved regions may appear to be something of an exception to this rule: it is not unreasonable to describe the various devolution Acts passed in 1998 and 2006 as the constitutions of Scotland, Northern Ireland and Wales. Even here, however, the constitutional legislation does not tell the whole story. The history of social security parity in Northern Ireland serves to illustrate both the importance of non-statutory sources in telling the story of how the devolved regions are governed and the wider importance of conventions with no apparent legal status in shaping how the UK as a whole is run.

Although it is possible to point to some legislative basis for parity in various Acts passed between 1926 and 1998, the impression given by the Northern Ireland Act 1998 of a flexible, voluntary agreement that arrangements for social security in Northern Ireland should mirror those on the opposite side of the North Channel "to the extent agreed" by two Ministers in no way conveys the constraints the convention has placed on the region's autonomy in this field. Subsidisation of the unemployment insurance fund was intended to be a short-term response to the acute fiscal crisis experienced by Northern Ireland in the 1920s. The agreement reached, to which politicians in Great Britain initially formed a less than enthusiastic

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party,¹²⁹ allowed the then-government of Northern Ireland to pursue its political aspiration that the minimum standard of living in that region should not fall behind that in the rest of the UK, pre-empting by some decades the writings of Marshall on the rights of social citizenship. By the time politicians and academics began to question whether near-absolute parity with Great Britain could in fact deliver an acceptable standard of living in Northern Ireland's economic circumstances and against a backdrop of political violence and historic discrimination against a significant section of the community, the principle that parity transfers were intended not only to facilitate, but to *require* adherence to Great Britain's approach had become deeply entrenched.

That hastily cobbled together arrangements can come to take on an unforeseen constitutional force does not, of course, preclude the evolution of the constitution. The truth of the maxim that devolution is "a process and not an event"¹³⁰ has been demonstrated repeatedly since 1998, with the devolution of major new powers to all three regions, a new primary legislative function for the Welsh Assembly, the referendum on Scottish independence and, subsequently, the ongoing renegotiation of the settlement for that region.¹³¹ Parity was the product of a particular set of political and economic circumstances and, in a very different political environment, now faces an unprecedented challenge. However, regardless of the future of the

¹²⁹ The Parliamentary committee set up to consider the Northern Ireland government's request for additional financial support had initially recommended a rather less generous settlement than ultimately agreed and some Labour MPs in particular remained hostile to the agreement in 1929 – see HC Deb 9 March 1926, vol 192 col 2145; HL Deb 23 March 1926 vol 63 col 746; HC Deb 1 March 1929 vol 225 col 2347; HL Deb 19 March 1929, vol 73 col 676; RJ Lawrence, *The government of Northern Ireland: public finance and public services 1921-1964* (Clarendon Press, 1965) 4

¹³⁰ R Davies cited by N Johnson, 'The Government of Wales Act 2006: Welsh devolution still a process and not an event?' (2007) 4 Web Journal of Current Legal Issues

¹³¹ Government of Wales Act 2006 c32; Northern Ireland Act 1998 (Devolution of Policing and Justice Functions Order) 2010 no 976; Scotland Act 2012 c11

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convention, its history provides some important lessons for Scotland and Wales as each region considers the future of its own devolution settlement, notably that formal devolved control of a given field of policy does not necessarily equate to genuine autonomy, especially in an economically weaker region when central government continues to hold the purse-strings.

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